Ahmed Ibrahim Bilal v Ketua Polis Negara & Ors

HIGH COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO 44–38–2002
AUGUSTINE PAUL J
9 NOVEMBER 2002

Criminal Procedure *— Appeal — Aggrieved person — Appeal against non-existent order — Whether appellants aggrieved persons — Criminal Procedure Code s 374*

The applicant, through his counsel, had on 8 October 2002 filed an application in the High Court seeking an order that all deportation proceedings against him be stayed and that a writ of habeas corpus be issued for his release. The application was supported by the affidavit of one Dhamina Khaira ('Dhamina') and was subsequently fixed for further hearing on 10 October 2002. On 10 October 2002, the Attorney General, appearing on behalf of the respondents, informed the court that the applicant's counsel had written to withdraw the application. The High Court, dismissed the application and in view of certain exceptional circumstances and as per the argument of the Attorney General, ordered the applicant to pay costs of the proceedings. The applicant and Dhamina appealed against the part of the High Court's decision allegedly ordering costs to be paid by Dhamina.

Held: dismissing the appeal and ordering the applicant to pay costs of the proceedings:

A person may appeal only against an order that has been made and not against an order that has not been made. As the High Court had not made an order of costs against Dhamina, she was not an aggrieved person within the meaning of s 374 of the Criminal Procedure Code to maintain the appeal. The applicant was also not an 'aggrieved' person as his appeal was based on an order that was not made (see p 611F).

[Bahasa Malaysia summary

Pemohon, melalui peguam beliau, telah pada 8 Oktober 2002 memfailkan satu permohonan di Mahkamah Tinggi untuk satu perintah agar semua prosiding-prosiding deportasi terhadap beliau digantung dan agar satu writ habeas corpus dikeluarkan supaya beliau dibebaskan. Permohonan tersebut disokong oleh afidavit seorang bernama Dhamina Khaira ('Dhamina') dan kemudiannya telah ditetapkan untuk dibicarakan selanjutnya pada 10 Oktober 2002. Pada 10 Oktober 2002, Peguam Negara, yang hadir bagi pihak responden-responden, telah memaklumkan mahkamah bahawa peguam pemohon telah secara bertulis menarik balik permohonan tersebut. Mahkamah Tinggi, telah menolak permohonan tersebut dan memandangkan terdapat keadaan-keadaan luar biasa yang tertentu dan sepertimana hujah Peguam Negara, telah memerintahkan

pemohon membayar kos prosiding. Pemohon dan Dhamina telah merayu terhadap sebahagian keputusan Mahkamah Tinggi yang dikatakan memerintahkan kos dibayar oleh Dhamina.

Diputuskan: menolak rayuan tersebut dan memerintahkan pemohon supaya membayar kos prosiding:

Seseorang boleh membuat rayuan hanya terhadap satu perintah yang telah dibuat dan bukan terhadap satu perintah yang tidak pernah dibuat. Memandangkan Mahkamah Tinggi tidak pernah membuat satu perintah tentang kos terhadap Dhamina, beliau bukan seorang yang terkilan dalam maksud s 374 Kanun Acara Jenayah untuk mengekalkan rayuan tersebut. Pemohon juga bukan seorang yang 'aggrieved' kerana rayuan beliau berdasarkan satu perintah yang tidak pernah dibuat (lihat ms 611F).

[*Editorial Note:* The applicant has filed an appeal to the Federal Court vide Criminal Appeal No 05–73–2002(W).]

Notes

For cases on appeal, see 5 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 126–603.

Cases referred to

Osman bin Mat Isa & Ors v Superintendent of Prison, Alor Setar & Anor [1974] 1 MLJ 189 (refd)

Puah Bee Hong & Anor v Pentadbir Tanah Daerah Wilayah Persekutuan Kuala Lumpur & Anor (Teo Keng Tuan Robert, Intervener) and another appeal [1994] 2 MLJ 601 (refd)

R v Secretary of State for the Home Department, ex parte Muboyayi [1991] 4 All ER 72 (refd)

Legislation referred to

Criminal Procedure Code s 374

Darshan Singh Khaira (*Darshan Singh & Co*) for the applicant.

Datuk Seri Panglima Abdul Gani Patail (*Mohd Yusof Hj Zainal Abiden, Tun Abdul Majid bin Tun Hamzah* and *Nordin bin Hassan* with him) (Jabatan Peguam Negara) for the respondents.

Augustine Paul J: On 8 October 2002 at 4.40pm Mr Darshan Singh, an advocate and solicitor, filed an application in court on behalf of one Ahmed Ibrahim Bilal ('the applicant') seeking an order, inter alia, that all further proceedings to have him deported be stayed and that a writ of habeas corpus be issued for his release. The application was supported by an affidavit affirmed by one Damina Khaira. In view of the urgency of the matter and based on certain representations made to me by Mr Darshan Singh, I

ordered that all further proceedings in the matter be stayed until its hearing at 2.30pm on 9 October 2002 after service of the documents on the respondents. I made the interim order of stay in accordance with para 1 of the Sch to the Courts of Judicature Act 1964; see also *Puah Bee Hong & Anor v Pentadbir Tanah Daerah Wilayah Persekutuan Kuala Lumpur & Anor (Teo Keng Tuan Robert, Intervener) and another appeal* [1994] 2 MLJ 601 at p 610 and *R v Secretary of State for the Home Department, ex parte Muboyayi* [1991] 4 All ER 72 at pp 81 and 91.

On 9 October 2002, both parties appeared before me at 2.30pm. The respondents, having explained the circumstances in which the applicant was detained and the applicable law, applied for time until the following day to file the necessary papers. I then fixed the application for further hearing on 10 October 2002 and made no further order as to stay of the proceedings in light of the submissions made before me. When the hearing resumed the following day, the honorable Attorney General, who appeared for the respondents, informed me that counsel had written a letter saying that he was withdrawing the application. The honorable Attorney General argued that in the circumstances of the case, the applicant must be ordered to pay the costs of the proceedings. I then dismissed the application and ordered that the applicant is to pay the costs of the proceedings in the exceptional circumstances of the case as enunciated in *Osman bin Mat Isa & Ors v Superintendent of Prison, Alor Setar & Anor* [1974] 1 MLJ 189. I do not consider it necessary to discuss the exceptional circumstances that compelled me to make the order as it is not in issue in this appeal.

This appeal is by the applicant and Damina Khaira '... terhadap sebahagian keputusan Yang Arif Hakim Dato' S Augustine Paul yang diberikan di Mahkamah Tinggi Kuala Lumpur pada 10 Oktober 2002 yang menurutnya perintahkan bahawa kos dibayar oleh Damina Khaira, perayu kedua'. It is elementary law that a person may appeal only against an order that has been made; and not against an order that has not been made. As I made no order of costs against Damina Khaira, she is not an 'aggrieved' person within the meaning of s 374 of the Criminal Procedure Code to maintain this appeal. Similarly, the applicant is also not an 'aggrieved' person as his appeal is also based on an order that was not made. The appeal filed by them is therefore not competent.

Appeal dismissed with costs and applicant ordered to pay costs of the proceedings.

Reported by Andrew Christopher Simon